36TH CONGRESS, 1st Session. } HOUSE OF REPRESENTATIVES. { REPORT No. 446.

NEBRASKA CONTESTED ELECTION.

APRIL 20, 1860.—Laid upon the table, and ordered to be printed.

Mr. CAMPBELL, from the Committee on Elections, submitted the following

REPORT.

The Committee on Elections, to whom was referred the memorial of Samuel G. Daily, contesting the right of Experience Estabrook, the sitting delegate, to a seat in the 36th Congress, as the delegate representing the Territory of Nebraska, beg leave to submit the following report:

The election out of which this contest has arisen took place on the 14th day of October, 1859. The returns filed in the office of the secretary of the Territory—where, by law, they were required to be filed—show that 3,100 votes were counted for Mr. Estabrook and 2,800 for Mr. Daily. The former having, by this count, a majority of 300, the governor of the Territory issued to him the certificate of election, by virtue of which he is now the sitting delegate.

The committee find, however, from an examination of the evidence before them, that in order to make for Mr. Estabrook the aggregate of 3,100 votes, there has been counted for him 292 votes as polled in the county of Buffalo, 28 votes as polled in the county of Calhoun, 21 votes as polled in the county of Izard, 20 votes as polled at the precinct of Genoa, in the county of Monroe, and, according to their estimate, 68 votes as polled in the county of L'Eau Qui Court, all of which are illegal. And they will proceed to state the reasons which have brought them to this conclusion.

I. As to the votes from Buffalo county:

By an act passed by the legislature of Nebraska Territory March 14, 1855, provision was made for the organization of this county. This is its language: "That all that portion of territory included in the following limits is hereby declared organized into a county, to be called Buffalo: Commencing at a point in the centre of the Platte river, ten miles east from the mouth of Wood river, running thence eastward up the southern channel of the Platte to the mouth of Buffalo creek; thence north thirty miles; thence east to a point directly north of the place of beginning; thence south to the place of beginning. The seat of justice is hereby located at Nebraska Centre."

No steps were taken, under the laws of the Territory, for the organization of this county by the election of officers; and it is the opinion of the committee that without such election there could be no organization. The act of the legislature does not organize a county; it merely provides for and authorizes an organization—that is, it authorizes an election to be held for county officers, under the general law regulating elections. If no such election is held, the county, notwithstanding the act of the legislature, cannot exercise any of the powers of an organized county, and cannot legally vote either for territorial officers or delegate to Congress.

The legislature of the Territory of Nebraska has provided by an act "in relation to new counties:" "That whenever the citizens of any *unorganized* county desire to have the same *organized*, they may make application by petition, in writing, signed by a majority of the legal voters of said county, to the judge of probate of the county to which such unorganized county is attached, whereupon said judge of probate shall order *an election for county officers* in such unorganized county." It then provides for a notice of the election, and a return of the votes "to the organized county," the execution of the necessary bonds by the officers elected, and the entire mode of consummating the organization. And it further provides that until this is done "all unorganized counties shall be attached to the nearest organized county directly *east* of them for election, judicial, and revenue purposes."

The committee do not suppose that the legislature intended to dispense with this mode of organization by the simple use of the word "*organize*" in the act creating a county. To suppose that they did would be to assume that they designed to prevent an election by the people of the necessary county officers. They know of no possible mode of legally organizing a county except by the election of officers by the people—a rule which must meet with universal assent under a popular form of government.

It is not pretended that Buffalo county was attached "to the nearest organized county directly *east* of" it for election purposes, for the vote is reported from Buffalo county directly; and hence, the only question to be inquired into is, whether or not it was so organized as that a vote could be legally polled within it?

It appears from the evidence that in May preceding the election the governor of the Territory was solicited "to *appoint* the county officers for Buffalo county," but that finding himself possessed of "no such power," he declined to do it. The governor was clearly right in this determination. He had no power to appoint officers; not even to fill a vacancy. He had once possessed this latter power, but the legislature had taken it away, and had provided that the vacancies should be only filled by election. But he was as clearly wrong in the other conclusion to which he came. He says that he considered "that Buffalo county was *fully organized* by the act of the territorial legislature." How it was organized *without officers*, he does not say, and the committee have already stated that, in their opinion, such a thing is impossible. But, acting upon this strange assumption, he says he advised the course which he considered necessary to be taken. This

was, that application should be made to the county commissioners of the nearest county on the east to have the initiatory steps taken for the election of county officers. It is not material to inquire whether he was right or wrong in this, because it does not appear that any such steps were ever taken. On the contrary, it is in proof that a few persons met together, without any notice, and, after the manner of a public meeting for political or other purposes, elected a president and secretary, and, upon *mere motion and vote, chose all the county officers!* The proceedings of the meeting were signed by the president and secretary, and forwarded to the governor; who, upon the strength of it, commissioned the officers so chosen, although there is no law authorizing him to issue commissions to county officers. And these are the officers who must have conducted the pretended election in Buffalo county, and who returned the 292 votes sent from that county for the sitting delegate. The committee consider the whole of these proceedings irregular and void in law.

The committee cannot omit further comment upon this extraordinary proceeding; for, to your committee, extraordinary it seems, in every sense of the term. The meeting was held on the 25th of June, 1852, at the place designated in the act of the legislature as the county seat, and where, according to the proof, there is "*one dwelling-house, one storehouse, one barn or stable, and one warehouse,*" and where but "*three persons*" constituted the population. The object of the meeting was avowed to be the "*recommending* suitable persons to fill the several offices of Buffalo county." And this object was carried out by the simple adoption of the several *motions* put to the meeting. For example: Mr. Charles A. Henry moved that Henry Peck be chosen probate judge, Charles T. Lutz sheriff, Joseph Huff commissioner of one of the precincts, Patrick Care justice of the peace, and John Evans constable, and they were all so chosen by the adoption of the motion. And so of all the rest. And then it was resolved "that Dr. Henry, with men living in the eastern precinct, do have them *recommend* suitable persons to fill the offices of justice of the peace and constable" in a precinct not supplied with officers at this meeting. And the whole proceedings closed with a resolution to the effect that the meeting "*recommend* the above-named gentlemen to hold the several offices to which they have been *nominated* by this meeting, and request the *governor* of this Territory to *commission* them for said offices."

It will be seen that this meeting merely "*nominated*" these officers, and *recommended* them to be *commissioned* by the governor; or, in other words, that it designed that the governor should *appoint* them. It has been already stated that the governor had no such power—that he could have nothing to do with the selection or commissioning of officers. Yet, notwithstanding this want of power, he did both *appoint* and *commission* the persons recommended and nominated by this meeting, and several others who were not recommended. It needs no argument to prove that no authority to hold an election or to transact any county business was conferred upon these persons by his act, and that all their proceedings are absolutely void. It is of no consequence to inquire what power he considered himself as possessing, since the fact that he did *appoint* them appears in proof. In a letter dated

July 26, 1859, and written from the "executive chamber," to one of the persons nominated to him, he says: "I have this day *appointed* the following officers," &c., going on to enumerate those who were nominated by the meeting. All these proceedings were in clear violation of law.

The foregoing facts in relation to the pretended organization of Buffalo county being made by the contestant, and the sitting delegate having offered no evidence of any other organization, it is necessarily to be inferred that there was no other; since, if there had been, he would have had no difficulty in showing it. Indeed, he has left it to be inferred from his mode of cross-examining the governor, whose testimony has been taken, that he did not rely upon any organization, but upon the legality of that made by the governor. The committee, therefore, conclude that there was no other, and have no difficulty in deciding that to be clearly in violation of law.

The 292 votes which were returned from Buffalo county were, therefore, illegally counted by the canvassers for the sitting delegate, and should be deducted from his poll.

It is apparent to the committee, from the proof in the case, that the parties who perpetrated this fraud were well aware of it. Of the 292 votes returned and counted from Buffalo county, 238 of them were reported as having been polled at a place called "*Kearny City*," and the certificate accompanying the returns state that this place is "*in the county of Buffalo.*" This is not correct by the act laying out the county, as already quoted; the *south* boundary is the Platte river, so that no part of it extends south of that river. Yet it is in proof that "Kearny City" lies on the *south* side of the Platte! A fact which must have been known to all the persons engaged in perpetrating this fraud. Such men would have no difficulty in contriving to furnish a list of votes for the whole county as easily as those furnished for this place, and doubtless did the entire work from the same motive.

It is scarcely possible that Buffalo county could have furnished so large a vote as 292; to have done so it must have been the sixth county, in point of population, in the Territory, and must have contained at least 1,500 inhabitants. The proof is, that there are "not over eight houses," and not "exceeding fifteen residents," and not "one acre of cultivated land or a farm-house," at or in the neighborhood of Kearny City; that at Nebraska Centre, the place named in the act as the county seat, there is only "one dwelling-house, one storehouse, one barn or stable, and one warehouse," one farm in cultivation, and one or two near by opening for cultivation; and at Centralia there was but a single individual. The sitting delegate does not offer to show any other settlements than these, and the committee are left no other alternative but to conclude that there are no others; if there had been it was his duty, after this proof made by the contestant, to have shown it. Hence, the whole of this vote of Buffalo county must be set aside as illegal and fraudulent in the opinion of the committee.

II. As to the votes from Calhoun county:

It is not pretended that Calhoun was an organized county, within the meaning of the statute. The act defining its boundaries is entitled "an act to *establish* new counties, &c.," and it was, therefore, in the same condition precisely as Buffalo county; that is, the act authorized such steps to be taken, without additional legislation, as were necessary to its organization. Like Buffalo, it could have been organized by the proper application to the county commissioners or probate judge (no matter which) of the nearest county on the east. But nothing of this kind was done. On the contrary, it was attached to the county of Platte for election purposes, and constituted a voting precinct of that county; and as such voting precinct it was the duty of those who had charge of the election there to return the poll-books to the clerk of Platte county, whose duty it was, by law, to send an abstract of them to the governor. But this was not done. Instead of doing it they sent the returns directly to the governor, and they were taken out of the post office by his private secretary, who opened and examined them, and then sent them himself to the clerk of Platte county, with directions to return them with the Platte county returns. This was manifestly a violation of law. The law of the Territory, as also of all the States, has pointed out a particular mode of making election returns, and has designated particular officers who shall open and inspect them. If they are opened and inspected by any others they are thereby vitiated; for if such a practice were tolerated innumerable frauds might be perpetrated, and the popular will defeated. By the law of Nebraska Territory the votes polled in Calhoun county could not be properly opened by any other persons than the probate judge and three disinterested householders of Platte county. Yet it is in proof that they were opened by the private secretary of the governor, and it is not proven or pretended that the probate judge, or any three householders of Platte county, ever saw them. On the contrary, it is proven that they were sent by the private secretary of the governor to the clerk of Platte county, and by him sent back to the governor. The clerk must have opened them himself; this is the necessary inference.

In the opinion of the committee, therefore, this violation of law vitiates the whole of the returns from Calhoun county. And the committee think that, for another reason, they should be set aside as fraudulent.

The contestant has proven by competent witnesses that the entire settlements in this county consisted of *two* families in the northwestern part, and *four* families in the southeastern part of the county, and that the whole voting population of the county does not exceed *six!* Yet there are 32 votes returned; 28 for the sitting delegate, and 4 for the contestant. One witness who has resided in the county swears that he does not know of a voting precinct in the county, or of an election being held. Another swears that he saw the returns in the clerk's office of Platte county, where they were sent by the private secretary of the governor; that he took from them the names of the persons who were represented as having conducted the

election, and when these names were shown to the witness who had resided in that county, the latter swore that he *never heard of such persons!* From the whole of the evidence on this point, the committee conclude that these returns were *forged* by some person; and they are supported in this conclusion by the fact that the clerk of Platte county has certified, since this contest began, that they "have been *abstracted*" from his office—a fact which goes to show that somebody had a motive for their concealment or destruction.

The committee think that as such proof as this has been made by the contestant, it was incumbent on the sitting delegate to show such facts as would rebut it, so as to set the matter right if it amounted to a misrepresentation. His not having done so ripens the presumptions they necessarily excite into convictions, and leaves the committee no other alternative than to conclude that the whole vote of Calhoun county is fraudulent, and should not have been counted.

The committee, in this view of the vote from Calhoun county, assumed it to be true, as sworn to by the private secretary of the governor, that this county is attached for election purposes to the county of Platte. But this is denied by the sitting delegate, who insists that it is not so attached, and it is in proof that the clerk of Platte county could find no record of a Calhoun county voting precinct in his office. This view of the matter leaves no doubt about the fraudulent character of the vote; for, if the county was not a voting precinct of Platte, it was evidently not organized, and could not legally vote at all. And besides, sending the return to the clerk of Platte by the private secretary of the governor, and its being opened by him, would vitiate it, as has already been shown.

III. As to the vote from Izard county:

The committee cannot avoid the conviction that the whole vote returned from this county is fraudulent. The vote returned and counted was 24, of which 21 were for the sitting delegate and 3 for the contestant. One witness, who resides on the main travelled road leading to this county, swears that he "never saw a settler of Izard county going to or returning from that county, or heard of one." Another, who visited the county last July, swears that he saw no evidence of settlement, no roads, nor any person who appeared to reside there; and that in travelling through the county he neither saw nor met any person. And a third swears that he has no knowledge of any settlements in the county, and has the opportunity of knowing if there were any. He says he has no doubt there are none at all.

This the committee consider to be competent proof. The non-settlement of a county could be proved in no other way; and being competent, it so establishes the fact of their being no inhabitants in Izard county as to make it conclusive, inasmuch as the sitting delegate has offered no proof to the contrary. His not doing so leaves the inference a necessary and inevitable one, that the county was wholly without population. And having no population it could not have been an organized county, and consequently no election could have been legally held there. The votes reported from there are therefore fraudulent and should have been rejected by the canvassers.

IV. As to the votes from the precinct of Genoa, in the county of Monroe:

It is conceded that this precinct is "in the reservation of the Pawnee Indians," set apart for their occupancy by the United States. By the act of Congress organizing the Territory it is provided that the territory occupied as an *Indian reservation* shall not be considered a *part of Nebraska Territory*, but that all such territory shall be excepted out of the boundaries until, by arrangement between the United States and the Indians, the title of the latter shall be extinguished. No such arrangement as this having been made between the United States and the Pawnee Indians as to this reserve, it was no part of the Territory, and hence there could be no voting precinct legally established within it. The votes returned from there were therefore illegal and fraudulent, and should be rejected.

V. As to the votes from L'Eau Qui Court county:

The entire vote of this county was counted for the sitting delegate, it being 128 votes. A gentleman who represented the county in the legislature of the Territory swears that there are only from thirty to thirty-five votes in the county; and the witness swears that there are but two settlements in it, and that it is generally unsettled. The *only* witness whose testimony has been taken by the sitting delegate makes a statement to some extent contradictory of these, and speaks of five settlements in different parts of the county. At one of these he says there is only "a single family;" at another, "probably half a dozen voters;" at another, "three dwellings, and *may be more;*" at another, "one house;" and at the last, the county seat, "about twenty or twenty-five houses." He speaks also of having seen some emigrants going to two other portions of the county, but does not say whether or no they settled there; and he also says that the year before the county polled eighty votes. The committee conclude, from all the evidence, that there cannot be over sixty votes in the county, and that all the vote above that number is fraudulent; that is, that sixty-eight votes should be deducted from the number counted for the sitting delegate.

The fraud in this county is abundantly proven. Two of the witnesses visited the county after the election to procure a copy of the poll-book. They succeeded in obtaining it from the clerk, but it was taken away from them by a mob and destroyed before they could get out of the county, those who composed the mob declaring that they were parties to the fraud, and were resolved not to be exposed. The original poll-books were afterwards *stolen* from the clerk's office, and, doubtless, were also destroyed by the same men; but the witnesses saw enough of them to swear that they contained the names of Howell Cobb, Aaron V. Brown, "ten names of McRea in consecutive order," and several others whom they knew to be non-residents of the county.

This proof of the contents of this poll-book is entirely competent, since the loss of the original is shown, and shows such fraud as ought not to go unpunished by the proper territorial authorities. The committee, in view of them, are satisfied that they have made a liberal allowance for the vote of the county.

The committee deem it due to the sitting delegate to state their opinion upon the main preliminary points made by him.

He insists first: That under the act of February 19, 1851, but one notice of contest could be served by contestant upon the sitting delegate, and that, having served that *one* notice, the power, under the act, is exhausted; and whether sufficient or not, the contestant must abide by it.

Your committee entirely dissent from this position. In their view more than one notice may be served under the act of 1851, provided they shall be served within the time required by that act; and they may be treated as one notice, or as supplemental notices, or the contestant may, with notice to the opposite party, withdraw an insufficient notice and serve a sufficient notice in the place thereof. All the act of 1851 contemplates is fair notice of the subject-matter of contest within the time specified by the act itself. As the sitting delegate has had such notice, in the opinion of the committee, he has no ground for complaint.

Second: That there is no competent proof showing the result of the election.

The committee think otherwise. The proof upon this point consists of a copy of the abstract showing the result, as ascertained by the governor and the other canvassers, and filed by the governor in the office of the secretary of the Territory. The law of the Territory makes it the duty of these canvassers to count the votes and ascertain the result of the election. This must necessarily consist of the putting together of the several returns, summing them up, and thus ascertaining the result. When the result is thus ascertained, the governor is required to issue a certificate of election to the person having the highest number of votes. He, of course, files away the result or abstract amongst the executive records as the evidence upon which his certificate is based. The returns of the clerks of the several counties would not be such evidence, wheresoever filed, for they show no results. They are mere abstracts of the poll-books returned from the precincts and are sent to the governor that one general and final abstract may be made, showing the aggregate of votes and the result; and this final abstract is, from its very nature, a public record belonging to the executive department.

The act for the organization of Nebraska provides that the secretary of the Territory shall preserve all the acts and proceedings of the governor which pertain to his executive duties. He is, therefore, made the custodian of this abstract, and as the original must remain where it is, it is competent to prove its contents by a certified copy. That is done in this case, and the committee think it is the best evidence that could be offered.

The certificate attached to the abstract shows that the officers of the Territory put this construction upon the law; for it states that it was filed in the office of the secretary *by the governor*, which was, of course, done in obedience to what the governor considered his duty under the law.

Third. That the abstract of votes cannot be properly received, because the contest was closed on January 6, 1860, by a notice from the con-

testant that he would take no further testimony, and the abstract was afterwards procured from the secretary.

There is, as the committee think, nothing in this objection; there is nothing in the facts of the case to give it plausibility even. On the 6th of January, 1860, the attorney of the contestant served upon the attorney for the sitting delegate a notice to the effect that the contestant would "proceed no further for the present with the *examination of witnesses*," &c.; and in the notice it was said, "whether any further testimony shall be taken in his behalf is a question reserved for further consideration;" * * * "should it be deemed necessary to exercise it, a new notice to that effect will of course be given." The committee understand this as having reference manifestly only to the "*examination of witnesses.*" The whole context of the notice shows this, and its object is stated to be that the sitting delegate may have an opportunity of proceeding to take his evidence. It says that if any further evidence is taken notice will be given. This, of course, refers to the taking of depositions; for no notice is necessary to obtain a certified copy of a record. Suppose the contestant had notified the sitting delegate that on a certain day he would apply at the office of the secretary and demand a certified copy of the abstract, what advantage could it be to him? The secretary, in making and certifying the copy, is not a witness, and could not be cross-examined. He performs the whole duty of making and certifying the copy without uttering a word; and the sitting delegate could not have interposed a valid objection to his doing so, for all citizens have a right to such copies of the public records. The argument that such a notice is necessary to obtain a record is frivolous.

But it is said that the sitting delegate is deprived of the opportunity of showing that this abstract is false. He does *not allege it to be false.* If he did, the committee would with pleasure have given him the opportunity to prove it so. But this paper was sent to the House by the judge in Nebraska, before whom the testimony was taken, sealed up with the other papers, and was along with them referred to this committee on the 16th of February, 1860. The order to print was made on the 23d of February, 1860. The sitting delegate was bound to know, and might have known, (if he did not know,) with reasonable diligence, that this abstract was among the papers before the probate judge and your committee all the time. If he had desired to allege anything against its validity or truthfulness, it was his duty to have brought it to the notice of the committee and House, and have asked for permission to substantiate his accusation by proof. But he has done nothing of this kind, and only argues against the certificate that he should have had notice when it was obtained, since if he had had such notice he *might* have shown it to be false. The committee are unable to appreciate the force of this argument, but consider the paper, having reached the House and committee regularly, together with the other papers, as competent proof. They consider the seal of the secretary as giving his certificate the import of absolute verity, and decline to impeach it except in a direct mode. As the sitting delegate has made no such case as involves an inquiry into its validity, the committee have declined to prosecute a collateral one.

Fourth. That the evidence has not been taken before a proper officer, within the contemplation of the act of 1851.

The act of 1851 provides that depositions may be taken before justices of the peace, notaries public, or judges of courts of record. In this case they were taken before a judge of a court of probate in Nebraska, and it is insisted by the sitting delegate that a court of probate is not a court of record. The committee think differently. Such a court can do nothing without a record, and from the very nature of its duties, it must be a court of record. But if it were possible to doubt about such a position, the statute of Nebraska Territory has, in so many words, declared courts of probate to be courts of record.—(Laws of Nebraska, 1855, page 119.)

Other technical objections were made by the sitting delegate, which are so immaterial as to render any reference to them wholly unnecessary.

The committee consider the case of the contestant clearly and abundantly proven, and from the absence of any contrary proof on the part of the sitting delegate, are compelled to regard the contestant as entitled to the seat. The frauds are palpable; so much so as to require that they shall be rebuked by the House as emphatically as possible. If such conduct should be tolerated, it would most seriously assail the integrity of the ballot-box.

The result to which they have come may be summed up, therefore, as follows:

Estabrook's whole vote	3,100
Daily's whole vote	2,800
Estabrook's majority	300

Illegal votes counted for Estabrook:

Buffalo county	292
Calhoun county	28
Izard county	21
L'Eau Qui Court county	68
Genoa precinct, Monroe county	20
Total of illegal votes	429

Illegal votes counted for Daily:

Calhoun county	4
Izard county	3
Genoa precinct	3
Total of illegal votes	10

There should be, therefore, deducted from the 3,100 votes counted for the sitting delegate, 429 illegal and fraudulent votes, which will reduce the whole vote cast for him to 2,671; and from the 2,800 votes counted for the contestant, there should be deducted 10 illegal and

fraudulent votes, which will make his whole vote 2,790, and this gives to the contestant a majority of 119 votes.

The committee, therefore, recommend the adoption of the following resolutions:

Resolved, That Experience Estabrook is not entitled to the seat as delegate from the Territory of Nebraska to the thirty-sixth Congress of the United States.

Resolved, That Samuel G. Daily is entitled to the seat as delegate from the Territory of Nebraska to the thirty-sixth Congress of the United States.